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Jurisdictional Conflicts Between Sovereign Nations

The broad issue producing the greatest disagreement concerning the American Law Institute's Revised Restatement of the Foreign Relations Law of the United States[1] is the treatment of jurisdictional conflicts between sovereign nations, where the unilateral imposition of law by one state directly clashes with the ability of another state to enforce its own laws or implement its policies over those persons residing within its territory. It is understandable that this issue should generate contention. It is probably the most important and perhaps the most difficult of all the issues addressed by the Reporters.

Part I of this article examines briefly the question of whether the Revised Restatement is a statement of international law or of United States law. Part II discusses the Restatement (Second)s treatment of jurisdictional conflicts, and Part III analyzes the Revised Restatement's provisions with respect to the same topic, considering in the process the rule of reasonableness, the act of state doctrine, and the foreign sovereign compulsion doctrine.

I. The Revised Restatement: United States Foreign Relations Law or International Law?

A threshold question is whether there is a difference between United States foreign relations law and international law. The Restatement

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1. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tent. Drafts Nos. 1 (1980), 2(1981), 3(1982), and 4(1983)) [hereinafter cited as REVISED RESTATEMENT, with tentative draft indicated]. The American Law Institute ("ALI") has since prepared two limited circulation, not-for-quotation discussion drafts dated August 15, 1984 [(hereinafter referred to as Preliminary Draft) and November 7, 1984 [hereinafter referred to as Council Draft]. The author has received permission from an ALI official to cite the Preliminary and Council Drafts in this article.

(Second) of Foreign Relations Law of the United States claimed that it was generally stating both, especially as to jurisdiction.[2] The tentative drafts of the Revised Restatement generally retain this claim.[3] Consequently, United States courts have often relied on the Restatement as an accurate articulation of international law, with little apparent awareness of the sharp conflicts with foreign authorities that the United States position has engendered in a number of cases.[4] This is unfortunate, because even if the Restatement accurately summarizes the existing state of United States case law, the awareness that there are serious conflicts between United States law and principles of international law generally accepted abroad is of major importance for the proper development of United States law. A common law system depends for its evolution upon the awareness not the obfuscation, of such tensions. Unfortunately, both the Restatement (Second) and the Revised Restatement largely obscure this conflict in their treatment of jurisdiction.

II. The Restatement (Second)'s Approach to Jurisdictional Conflicts

The Restatement (Second)'s approach to conflicting state interests is essentially contained in Sections 39 and 40. Section 39 says that a state having jurisdiction to prescribe or enforce is not precluded from doing so solely because such exercise of jurisdiction requires a person to violate the law of another state having concurrent jurisdiction. Section 40 says that national courts should (not "must") exercise their discretion to avoid adjudication or enforcement that conflicts with important interests of affected foreign states if a balance-of-factor analysis leads to the conclusion that the United States jurisdictional interest is not predominant. The Department of State and some others appear to believe that the Restatement (Second)'s largely discretionary approach is an accurate statement of international and United States law today and that it should be essentially retained in the Revised Restatement.[5]

I disagree. As the Revised Restatement recognizes, the "practice of states" which they follow "from a sense of legal obligation" is one of the most important sources of international law.[6] Subject to two exceptions discussed below,[7] the United States, so far as I have been able to determine,

2. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Intro. at XII (1965).

3. REVISED RESTATEMENT (Tent. Draft No. 2(1981)), *supra* note 1 at Introductory Note to Part IV, ch. 1, p. 95.

4. *See, e.g.*, United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1162–64 (C.D. Cal. 1983).

5. *See, e.g.*, Address by Davis R. Robinson, Legal Adviser, Department of State, at the New York City Bar Ass'n (Feb. 14, 1984) (copy on file with author).

6. REVISED RESTATEMENT (Tent. Draft No. 1(1980)) *supra* note 1, at §102(2), p. 24.

7. *See infra* text accompanying notes 19 to 23.

is the only nation or authority (including the European Economic Community) that claims the right to enforce its jurisdiction unilaterally to override, in peacetime, contrary national laws or fundamental policies of foreign states concerning conduct taking place wholly or in significant part within foreign territory.

From the vantage of foreign states and the European Economic Community, the United States, virtually alone, violates international law in primarily three areas of adjudication and enforcement: (1) imposing United States law to override foreign authority within the latter's territory by claiming a primary right to regulate foreign subsidiaries, branches, and (in the area of export controls) licensees and goods, based on the ownership or control by United States nationals or United States parent enterprise (or on private obligations assumed by foreign licensees in contracts with United States licensors);[8] (2) imposing United States law to compel the production of documents or other evidence from within the territory of a foreign nation without its permission and, recently, fining or punishing persons who fail to produce such evidence even when commanded by the host sovereign's government or courts not to do so under penalty of foreign law;[9] and (3) imposing United States law even where (a) foreign governments come before United States authorities and represent that the foreign sovereign takes responsibility for the conduct at issue, (b) those governments declare that that conduct was undertaken in furtherance of foreign sovereign law or policy, and (c) a predominant portion of that conduct took place outside of the United States.[10] The Restatement (Second) has been used from time to time to justify each of these "illegal" assertions of law by United States courts, officials of the Executive Branch, and United States regulatory agencies.

The State Department and some others appear to take the position that there are few, if any, mutually agreed standards for resolving sovereign

8. *See, e.g.*, Diplomatic Note and Comments of the European Community on the Amendments of 22 June 1982 to the United States Export Administration Regulations (Aug. 12, 1982), *reprinted in* A.V. Lowe, *Extraterritorial Jurisdiction* 197–211 (1983); Compagnie Europeene des Petroles S.A. v. Sensor Nederland B.V., No. 82/716 (D.Ct. Neth. Sept. 17, 1982) (translated into English at 22 Int'l Legal Materials 66 (1983)); Fruehauf v. Massardy, [1968] D.S. Jur. 147, [1965] J.C.P. II 14,274bis (Cour d'Appel, Paris), discussed in Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on Fruehauf v. Massardy*, 83 HARV. L. REV. 579 (1970); Statement by the Honorable Allan J. MacEachen (then Deputy Prime Minister and Secretary of State for External Affairs of Canada) on Extraterritoriality and Proposed Amendments to the Export Administration Act, to the Parliamentary Standing Committee on External Affairs and National Defense (March 15, 1984).

9. *See, e.g.*, United States v. Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 778 (1985).

10. *E.g.*, General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D 290 (S.D. Cal. 1981); United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), *appeal dismissed*, 451 U.S. 901 (1981).

jurisdictional conflicts in the international community, and, therefore, that each nation is free to apply and enforce its law to the fullest extent, consistent with fair process, regardless of sovereign conflicts and regardless of the territorial jurisdictional claims of a foreign sovereign, at least where important national interests are at stake.[11] This view is unsupported by any significant body of international scholarship outside the United States, and it is repudiated by the current norms and practices of every other developed nation under its system of municipal law.[12] No other nation has sought in peacetime to enforce regulations like those imposed by the Treasury Department in the *Fruehauf* case,[13] or like the United States' Soviet pipeline regulations.[14] No other nation has, to my knowledge, compelled foreign discovery in violation of foreign law, even where the subpoena subject acted in bad faith. No other nation has adjudicated, so far as I have been able to determine, foreign conduct for which a foreign state takes political responsibility, as the United States did, for example, in the *Watchmakers* antitrust case.[15]

The proposition that there is a vacuum which permits unbridled unilateral assertions of jurisdiction might be tenable if the issue were limited to one state unilaterally regulating conduct as to which other states were indifferent. Instead, in each of the three areas outlined above,[16] the issue involves unilateral conduct having the effect of challenging and undercutting the authority of a state within its own territory. It is clear everywhere in the world except the United States that the principle of territoriality, as the paramount basis for state adjudicatory and enforcement jurisdiction under international law, confers primary jurisdiction on a sovereign state even

11. *See generally supra* note 5.

12. *See* authorities cited *supra* note 8 and *infra* note 35.

A good example is the 1979 Swedish Act on Prohibition of Investments in South Africa and Namibia, Swed. Stat. 1979:487. The Act forbids Swedish companies from directly or indirectly investing in South African or Namibian companies. The law also prohibits foreign subsidiaries controlled by Swedish companies from investing in South Africa or Namibia. The legislative history to the Act invoked the nationality principle to justify the inclusion of controlled foreign subsidiaries, but was careful to note the limits to that jurisdiction:

> In the event of collisions of law, however, the basic principle, according to international law, must be not to coerce one's own legal subjects, when they are under the territorial jurisdiction of a foreign state, to actions incompatible with the legal system of that state.

Swedish Ministry of Commerce, *Prohibition of Investments in South Africa and Namibia* 50 (1979). Thus, Swedish law supports the proposition that the controlling general principle is for a country to refrain from imposing its law to override conflicting foreign legal authority applied to conduct or persons within the state's territory.

13. Fruehauf v. Massardy, [1968] D.S. Jur. 147, [1965] J.C.P. II 14,274bis (Cour d'Appel, Paris), discussed in Craig, *supra* note 8.

14. 47 Fed. Reg. 27,250 (June 24, 1982), *amending* 15 C.F.R. Pts. 376, 379 & 385, *repealed* 47 Fed. Reg. 51,858 (Nov. 18, 1982). Nov. 1982, *reprinted* in 21 I.L.M. 864 (1982)

15. United States v. Watchmakers of Switz. Information Center, 133 F. Supp-. 40 (S.D.N.Y. 1955), 1963 Trade Cas. (CCH) §70,600 (S.D.N.Y. 1962), *judgment modified,* 1965 Trade Cas. (CCH) §71,352 (S.D.N.Y. 1965).

16. *See supra* text accompanying notes 8–10.

where other states have claimed jurisdiction concurrently.[17] The Restatement (Second) repudiates the supremacy of the territoriality principle and thus fails to state international law. While the history is not clear, I understand that a panel of foreign experts was assembled to comment upon the jurisdictional analysis of the Draft Restatement (Second) and that the panel's report criticized the claim that the draft reflected international law.[18] The Restatement (Second) was apparently marred by the failure to acknowledge these dissenting views in the final product. It would be even more regrettable if the same mistake were made again.

As mentioned above,[19] where other nations assert concurrent jurisdiction over conduct outside their territory (based for example on the nationality principle), I am aware of only two types of laws in any other state which have the purpose or effect, in peacetime, of regulating such conduct contrary to the law of the place where the conduct occurs: (1) foreign political boycott laws and (2) foreign "blocking" laws. Foreign political boycott laws have been justified as extraordinary measures during continuing conditions of belligerency, but the United States has not accepted the validity of these laws as applied to United States persons and has responded with its own blocking law to undermine these political boycott laws.[20]

Foreign blocking laws are a special exception to the general abhorrence foreign governments have about applying their laws extraterritorially to undermine the territorial jurisdiction of the United States or any other nation. Apart from the United States' blocking statute,[21] every national blocking law in effect today of which I am aware was explicitly adopted as a measure of self-protection against the unilateral extraterritorial application of United States law.[22] In each case, the legislating state viewed some United States laws, especially antitrust, export control and discovery laws,

17. J. BRIERLY, THE LAW OF NATIONS 162 (6th ed., Waldock, ed. 1963).

18. *See* 39 A.L.I. Proc. 315 (1962).

19. *See supra* text accompanying note 7.

20. The boycott provisions of the Export Administration Act ("EAA") are contained in 50 U.S.C. App. §2407 (1982) (prohibiting, *inter alia,* United States persons from furnishing to boycotting countries information concerning the race, religion, sex or national origin of any other United States person). The implementing regulations are in 15 C.F.R. §369 (1984). When Congress failed to extend the EAA in 1984, President Reagan claimed that section 203 of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §1702 (1982), gave him the authority to continue the regulations through Executive Order until Congress reauthorized the EAA. *See* Exec. Order No.12,470, 49 Fed. Reg. 13,099 (April 13, 1984); 50 Fed. Reg. 12,513 (Mar. 29, 1985). However, IEEPA only allows the President to regulate or prohibit certain international commercial transactions that pose an unusual and extraordinary threat to United States national security, foreign policy or economic interests. 50 U.S.C. §§1701, 1702 (1982). Thus, IEEPA may not provide the President with the statutory authority to continue those prohibitions in the boycott provisions of the EAA and its regulations that do not involve commercial transactions.

21. *See supra* note 20.

22. At least 17 nations, including the United States, have enacted such legislation. Included in that number is Canada, which just passed the Foreign Extraterritorial Measures Act, Stat. Canada 1984, ch. 49 (Dec. 21, 1984).

as a direct infringement of its sovereignty. Although these blocking laws are in large part territorial, e.g., are aimed at blocking the release of information and documents from within the territory of the blocking nation, several of them at least authorize attempts to override offending United States law by directing their nationals within the United States (or third states) not to comply when the blocked United States law is believed to violate international law.[23] However, this extraterritorial assertion of blocking jurisdiction appears to be an expression of principle and of indignation which would probably not be enforced in the face of contrary orders by United States courts. Blocking laws are a dramatic expression of the conviction of these nations that in many adjudications and in many enforcement acts since World War II, the United States has violated and continues to violate international law.

Only four national blocking laws were in effect at the time the Restatement (Second) was adopted by the ALI in 1965. The very fact that adoption of these statutes in the intervening twenty years has more than quadrupled is strong evidence that the Restatement (Second), in permitting the United States to exercise so expansive an extraterritorial jurisdiction even where it conflicts with the policies of the territorial state, did not express international law then and cannot possibly express international law today.

III. The Revised Restatement's Proposed Approach to Jurisdictional Conflicts

The Reporters, through the August 15, 1984 Preliminary Draft, have moved substantially closer to a proper recognition of the views of foreign legal scholars and authorities as to the international law of jurisdictional conflicts. They have acknowledged that there are sharp limits to unilateral assertions of United States jurisdiction where the territorial preference resides with a conflicting foreign state. They have generally[24] accepted the validity of the foreign compulsion defense, have called into question the legality under international law of the regulations applied in *Fruehauf*[25] and in the Soviet pipeline case,[26] and have resisted pressures to narrow the act of

23. *See,* e.g., Foreign Proceedings (Prohibition of Certain Evidence Act 1976, § 5(c), *reprinted in* A. V. LOWE, *supra* note 8, at 80.

24. Where the Reporters have not done so fully, as in Section 420, they are perhaps recognizing recent unfortunate United States lower-court decisions in violation of international law. However, the law in this area is still evolving and its future direction is not clear. *See generally,* Rosenthal & Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery,* 16 N.Y.U. J. INT'L L. & POL. 1075 (1984).

25. Fruehauf v. Massardy [1968] D.S. Jur. 147 [1965] J.C.P. II 14,274bis (Cour d'Appel, Paris), discussed in Craig, *supra* note 8.

26. Dresser Industries, Inc. v. Baldrige, 549 F. Supp. 108 (D.D.C. 1982).

state defense (as some would have it narrowed to require some political acts of foreign sovereigns within their territory to be subjected to the unilateral scrutiny of United States courts). However, the introductory note to part IV, Jurisdiction and Judgments, of the August 15, 1984 Preliminary Draft fails adequately to convey this deep, omnipresent, serious and probably increasing gulf between official United States views and those of virtually every other foreign state concerning national jurisdiction under international law.

For example, the statement that "attempts by some states—notably the United States—to prescribe and apply their law on the basis of very broad conceptions of territoriality . . . have created tensions,"[27] is an understatement. It is not "some states," it is only the United States that weakens foreign state jurisdictions in applying their national laws to govern their citizens and those present within their territory. Judges and law clerks who will use the Revised Restatement should have a clearer idea that the United States is coming to be viewed abroad as a "rogue elephant" when it so applies its laws. Furthermore, the Reporters appear to be under considerable pressure to erode even these understated recognitions of state practices and foreign legal authority. For example, I understand that Section 403(3) of the November 7, 1984 Council Draft provides that "the state with the lesser basis for jurisdiction in the light of all the relevant factors, Subsection (2), should refrain from exercising its jurisdiction."[28] In contrast, the corresponding portion of the August 15, 1984 Preliminary Draft stated that "an exercise of jurisdiction that is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state that is not unreasonable under those criteria."[29] The latest draft thus appears to be a retreat toward the virtually precatory standard of Section 40 of the Restatement (Second). It suggests that courts and prosecutors have relatively broad discretion, as a matter of international law, not to defer to foreign law even where that foreign law is applied territorially.

Even apart from the retrogression in the latest draft, however, the Reporters go too far when they imply that the rule of reasonableness in Section 403, insofar as it permits "reasonable" law enforcement contrary to the law or policy of the territorial state, has emerged as a principle of international law.[30] While it is a considerable advance over the discretionary Restatement (Second) standard to say that an exercise of jurisdiction on one of the

27. Preliminary Draft, *supra* note 1, at IV-5.
28. Council Draft, *supra* note 1, at §403(3).
29. Preliminary Draft, *supra* note 1, at §403(3).
30. Preliminary Draft, *supra* note 1, at §403 Comment a. *See generally*, Meesen, *Antitrust Jurisdiction under Customary International Law*, 78 A.J.I.L. 783 (1984).

otherwise appropriate bases indicated in Section 402 can nonetheless be unlawful, Section 403 should make clear that such an exercise is unlawful if it conflicts with the laws and policies of a foreign sovereign which has jurisdiction by territoriality.[31] No other nation has accepted the exercise of extraterritorial jurisdiction under such circumstances.

The Reporters refer to the Federal Republic of Germany and the Commission of the European Economic Community as examples of nations or authorities that have sought to regulate extraterritorial conduct having an effect within their jurisdiction and which have thereby had to come to grips with limiting the exercise of their national jurisdiction to minimize the intrusion into the concerns of other states.[32] But while those cases did involve the assertion of "extraterritorial" jurisdiction based on the objective territorial principle,[33] they did not involve an attempt to exercise jurisdiction so as to govern conduct abroad in conflict with the law or policy of the place where the conduct occurred. Moreover, there is extensive authority against the exercise of such jurisdiction, reflected in the norms and practices of foreign states for centuries through today. One recent source for relevant state laws and policy declarations expressing these norms and practices is A. V. Lowe's documentary reference book;[34] others are the materials appended to three annual reports of the International Law Association.[35]

31. While the Reporters would not apply their balancing test to override conflicting territorial jurisdiction, the term "reasonable" and the criteria of reasonableness in section 403(2) draw so much of their content from the eye of the beholder, that the Reporters' reasonableness does not give sufficient assurance of the reasonableness of United States Executive Department and judicial officials to justify confidence in its even-handed application. Nevertheless, the factors set forth in section 403(2) have merit as a set of considerations which can provide a useful framework for bilateral negotiations between governments to resolve these conflicts (*see* the comment of Judge Wilkey at text accompanying note 64, *infra*). My quarrel is with the application of those factors unilaterally as a principle of international law where there are sovereign conflicts.

32. Preliminary Draft, *supra* note 1, at §403 Comment a & Reporters' Note 3.

33. There is in fact some uncertainty as to whether one of those cases, *Dyestuffs,* is an exercise of the objective territoriality principle. Although the European Commission based jurisdiction on that principle, the European Court of Justice affirmed on the ground that the foreign firm had implemented its practices within the Common Market through controlled subsidiaries. Imperial Chem. Indus. Ltd. v. Comm'n, [1971–73 Transfer Binder] CCH Common Mkt. Rep. ¶ 8161, at 8030-31 (EEC C.J. 1972). Moreover, even as a simple application of extraterritorial jurisdiction, uncomplicated by the conflicts of policies focused on here, these cases are not very expansive in their jurisdictional reach. *Dyestuffs* involved the concerted fixing, outside the Common Market, of prices *within* the Market. And while another of the cases, *Rothmans,* involved an acquisition of stock outside the jurisdiction, the remedy was limited to banning the acquisition of the West German subsidiary. Dec. of Kammergericht of July 1, 1983. (Phillip Morris/Rothmans), Kart 16/82, summarized in English in 4 CCH COMM. MKT. RPTR. §40,571.

34. A.V. LOWE, *supra* note 8.

35. Int'l Law Ass'n, Report of the Fifty-First Conference 354–416, 565–92 (1964); *id.,* Report of the Fifty-Fourth Conference 213–46 (1970); *id.,* Report of the Fifty-Fifth Conference 142–75 (1972).

The Reporters accept that nation states have an obligation to notify and consult before applying their national laws in a manner undermining foreign law. I understand that in the November 7, 1984 Council Draft they cite, too tersely, as one of the sources for this proposition the 1984 Report of the Organization for Economic Cooperation and Development ("OECD") endorsing such an obligation.[36] While OECD decisions are not binding intergovernmental agreements, this text was expressly considered and approved at the Ministerial level by, among others, the United States Secretary of State.[37] Such an endorsement should and does properly raise serious expectations of compliance by participants. The Report should receive fuller explication in the final draft. Most regrettably, the State Department Legal Adviser now appears to retreat from the position that there is a legal obligation to notify and consult where conflicts exist.[38] This is without foundation, as is the view, expressed by some others, that the 1984 OECD Report makes the obligation to notify and consult the only conflict-resolution obligation generally recognized to be imposed by international law. By its very terms the OECD Report raises other pertinent expectations about conflict avoidance in national law enforcement:

> In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:
>
> i) Have regard to relevant principles of international law;
>
> ii) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interest of other Member countries;
>
> iii) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries; . . . .
>
> Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.[39]

Sovereign states must be committed to protecting their sovereignty within their territory. The United States is committed to that principle, although,

36. Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* 26 (1984) [hereinafter cited as OECD Report], *cited in* Council Draft, *supra* note 1.

37. OECD, Press/A (84) 28, ¶36 (May 18, 1984)

38. Memorandum accompanying letter dated Dec. 4, 1984, to Professor Geoffrey Hazard, Director ALI, from Davis Robinson, Legal Adviser, Department of State, at 1 (on file with the author).

39. *See* OECD Report, *supra* note 36, at 26. *See also,* F. KIRGIS, PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE 277–358 (1983) (discussing prior-consultation norms in economic relations between states).

unlike other nations, it almost never has to deal with foreign laws seeking to undermine United States law within the United States. When the United States is faced with such a threat, as with the Arab boycott regulations, it repudiates their validity under United States law and passes blocking legislation to frustrate their implementation against United States nationals and enterprises. If, for example, a court in the Federal Republic of Germany were to apply German law to force United States subsidiaries or licensees of German companies to repudiate contracts in the United States that were consistent with and in furtherance of a United States policy to encourage voluntary private contracting, and that were enforceable under United States law, neither the United States Executive Department, nor United States courts, nor United States citizens would tolerate it—even if German officials and German courts validated such jurisdiction under a Section 403 analysis. If the United States would not accept the very jurisdictional claims when turned against it which it has made against others, how can it say that its claims are supported by international law?

Although Section 403 does not state international law and no foreign government has applied a balancing test to review, in its domestic courts, the legality of foreign law or policy, territorially applied, the Reporters make a strong case that it states United States foreign relations law, based on cases such as *Timberlane Lumber Co. v. Bank of America*[40] and *Mannington Mills, Inc. v. Congoleum Corporation*.[41] Notwithstanding the relatively few criticisms of the *Timberlane-Mannington Mills* line of cases, such as the critique by Judge Wilkey in *Laker Airways Ltd. v. Sabena*, [42] the rule of reasonableness is being adopted and followed in most federal circuits.[43]

There certainly are problems with the rule of reasonableness as developed thus far by United States courts. The factors are imprecise and do not always lead to a clear result. It is true that most United States judges have little experience in evaluating political and economic policies of a foreign coun-

40. 549 F.2d 597 (9th Cir. 1976).

41. 595 F.2d 1287 (3d Cir. 1979).

42. 731 F.2d 909 (D.C. Cir. 1984). Although Judge Wilkey was critical of application of a rule of reasonableness in the *Laker* case, he recognized the appropriateness of examining reasonableness in other contexts. *Id.* at 572 n. 169.

43. Balancing has been applied in at least seven circuits other than the District of Columbia Circuit, and I have found no court of appeals decision, other than Judge Wilkey's, rejecting it. United States v. Bank of Nova Scotia, 722 F.2d 657, 658 (11th Cir. 1983), *on appeal following remand*, 740 F.2d 817 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 778 (1985); United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 345 (7th Cir. 1983); Montreal Trading Ltd. v. Amax, Inc., 661 F.2d 864, 896 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1302 (3d Cir. 1979) (concurring opinion); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976); United States v. Field, 532 F.2d 404, 407 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 41 (2d Cir. 1972).

try. It has been and is likely to continue to be true, much as one would wish otherwise, that United States courts may frequently intensify foreign relations conflicts by giving insufficient weight to foreign sovereign interests. Nonetheless, the courts seem willing to tackle these problems, and denying the present vitality of the doctrine because it is imperfect is an unsupportable rejection of *stare decisis*. Furthermore, there are instances where the doctrine has been used in a way which reduces these difficulties.[44]

Even more to the point, the problems with the *Timberlane* Restatement reasonableness doctrine would be sharply limited if it were made clear (e.g., in Section 403(3)) that reasonableness does not permit a finding of United States jurisdiction if the acts of a foreign state effecting public policy within its territory would thereby become subject to possible criticism or override by United States adjudication, or would be undermined by United States enforcement. Furthermore, if the relationship between Section 428 (dealing with the act of state doctrine) and Section 403(3) were made clear and consistent, with the act of state doctrine properly stated to highlight its full scope, the *Timberlane* reasonableness doctrine would become virtually unobjectionable and hardly, if at all, in conflict with international law and the traditional competence of United States judges.

Section 428 of the August 15, 1984 Preliminary Draft sets forth the act of state doctrine as follows:

> Subject to § 429, courts in the United States will generally refrain from examining the validity of an act of a foreign state taken in its sovereign capacity within the state's own territory.[45]

Section 429 properly says that the doctrine will not be applied to claims to expropriate specific property located in the United States. Comment b to Section 428 says that the act of state doctrine has been applied primarily to cases involving the taking of private property. These references imply that the doctrine's primary relevance for the future will continue to be in expropriation cases. It is not until Reporters' Note 1 that the broad and critically important scope of the defense is identified. Note 1, "Rationale for the Doctrine," is so important it should be moved up to be an early Comment. It is excellent in its present form and should not be modified:

> *Rationale for the doctrine*. Several justifications for the act of state doctrine have been advanced by courts and commentators. Some stress the lack of consent by foreign states to review of their actions by domestic courts of another state; some stress the lack of articulable legal standards by which to judge the foreign state's act; some stress the potential for interference with the conduct of foreign affairs by the Executive Branch; some suggest that judgment on the validity of acts of

44. *See, e.g.*, Report of Amicus Curiae Stephen J. Pollak to Judge Harold H. Greene, filed on Feb. 28, 1984 in Laker Airways Ltd. v. Pan American World Airways, Civil Action No. 82-3362 (D.D.C.).

45. Preliminary Draft, *supra* note 1, at §428.

foreign states involves courts in the determination of political questions for which they lack competence. See § 1, Reporters' Note 1. The act of state doctrine may also be seen as a counterpart to limitations on a state's jurisdiction to prescribe, §§ 402–403, in that it precludes application of forum law to acts as to which the forum (i.e., the United States) lacks jurisdiction to prescribe or apply its own law, including (where consensus is absent) its version of international law.[46]

Increased economic interdependency among the world's nations, increased economic regulation in some foreign states, and the continuing extraterritorial application of national law by the United States, virtually alone among the world's nations, suggest that the act of state doctrine is, right now, much more relevant and is likely to be increasingly so in the years ahead in non-expropriation cases of sovereign law and policy conflict.[47] In my judgment, the most significant application of the act of state doctrine since *Sabbatino*[48] has been by the Ninth Circuit (as in *Timberlane*) in *International Association of Machinists (IAM) v. Organization of Petroleum Exporting Countries (OPEC)*,[49] which is discussed perfunctorily in the Revised Restatement with an unresolved question that suggests the Reporters may have omitted an important part of the decision.[50] In *IAM v. OPEC*, the court held that where a United States legal action is so insulting to implicated foreign states, where it so clearly interferes with the efforts of the political branches of the United States government to seek favorable relations with those states, and where the granting of any relief would amount to telling a foreign sovereign how to govern its own people, the action lies beyond the court's proper adjudicatory and enforcement powers and should be dismissed.[51]

There is no value in breaking out a separate discussion of antitrust act of state cases since the same act of state considerations apply to them as to other types of international commercial cases and since to do so compounds the erroneous impression that the issues they reflect are less significant for act of state purposes than those posed in expropriation cases. Furthermore, the defense is applicable in antitrust cases even when the motives of foreign governments need not be scrutinized[52]—contrary to the Reporters' statement in the August 15, 1984 Preliminary Draft.[53]

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46. *Id.* at §428, Reporters' Note 1.

47. *See, e.g.*, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 723 F.2d 319, (3d Cir. 1983), *cert. granted in part*, 53 U.S.L.W. 3702 (U.S. Apr. 2, 1985) (No. 83-2004), discussed at text accompanying notes 61–63, *infra*.

48. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

49. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

50. Preliminary Draft, *supra* note 1, at §428, Reporters' Note 6.

51. IAM v. OPEC, 649 F.2d at 1361. *Accord*, Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1983); Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

52. IAM v. OPEC, *supra* note 49 (act of state doctrine applied even though the motive of the OPEC states in preserving their natural resources through a price-fixing cartel was not in dispute).

53. Preliminary Draft, *supra* note 1, at §428, Reporters' Note 10.

Contrary to the articulation of Section 428 in the current draft, the *IAM* case also demonstrates that the doctrine does not just apply to the acts of foreign sovereigns within their own territory. Rather, it applies to acts, wherever undertaken, that express the public policy of a sovereign as to persons or conduct within its territory. While it is true in that case that each OPEC state passed a law imposing a surcharge on oil pumped within its territory, those surcharges were only the result of the alleged illegal conduct—the conspiracy that all would apply these surcharges at uniform levels. The acts of conspiracy took place primarily in non-OPEC countries such as Austria and Switzerland. It makes no sense, as the *IAM* court implicitly recognized, to limit the doctrine to territorial acts in complex non-property cases where conduct at issue usually involves acts in several jurisdictions. The act of state doctrine applies in the *IAM* and comparable cases because each OPEC nation has a paramount claim to regulate the mining and sale of its natural resources, located within its territory, free from the extraterritorial interference of foreign national courts. It is for the United States Executive Branch to act through diplomatic means if this policy offends vital United States interests.

While there is no recent explicit Supreme Court precedent dealing with the act of state doctrine in non-expropriation cases, two years before its decision in *Sabbatino* the Supreme Court implicitly recognized the broad scope of the defense in such a case. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[54] a Canadian official enlisted a private company to help his office purchase and allocate wartime supplies of a rare metal. The plaintiff claimed to be injured because the private company bought no metal from the plaintiff. The Court found no act of state defense because of a lack of evidence that the Canadian government had directed or approved of the discriminatory buying practices. By implication, if the Government of Canada had manifested a clear public policy interest in having this private agent engage in preferential purchases, the doctrine would have applied. Nor can it have mattered if the Canadian official with the authority to direct the agent to make discriminatory purchases had communicated the direction while on a buying trip to Colorado where the metal was mined. The place of the non-justiciable act is irrelevant to the availability of the defense.

In view of the increasing importance of non-expropriation cases, and the rejection of a strict requirement that the non-justiciable conduct has taken place only within that state's territory in the application of the act of state doctrine in recent non-expropriation cases (a rejection which is also properly manifested in the rule of reasonableness of Section 403), it would be more appropriate if Section 428 were restated as follows:

54. 370 U.S. 690 (1962).

> Courts in the United States will generally refrain from adjudicating sovereign acts of a foreign state that effect its public policy within its territory.[55]

In his letter to Louis Henkin, Chief Reporter of the Revised Restatement, of August 24, 1984, Judge Wilkey refers to an address by a Canadian official which expresses a Canadian rejection of interest balancing.[56] If United States courts properly applied the act of state doctrine in cases of sovereign conflict, Canadian and other foreign objections to the *Timberlane* standard probably would be greatly diminished. In cases in which sovereign law or public policy "merely formed the background to the dispute or in which the only governmental actions were the neutral application" of foreign laws not conditioned or undermined by the assertion of United States jurisdiction,[57] or if foreign governments were largely uninterested in protecting insignificant policies in situations of minor conflict, application by the United States courts of a rule of reasonableness would neither violate international law nor impair the abilities of foreign governments to govern. Under these circumstances the act of state defense would fail, as in the *Mannington Mills* case, and applying the rule of reasonableness would become much more a traditional conflicts of law analysis in the domain of private international law, for which national courts are better equipped and have greater experience than in balancing sovereign interests.

There are two other important points about the act of state defense which should be amplified, at least in the Reporters' Notes. First, Reporters' Note 3 of the August 15, 1984 Preliminary Draft purports to discuss a definition of act of state. In fact, the issue that it appears to address is whether a government can inform a court dispositively of its claim that an act of state was involved, even as to conduct which appears to the court to be ambiguous. The Reporters cite three cases on this issue. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[58] the Supreme Court rejected a mere statement by counsel to the Cuban government at trial as insufficient evidence that Cuba's refusal to pay an alleged debt owing to Dunhill was a Cuban act of state. In *Oetjen v. Central Leather Co.*,[59] and *Ricaud v. American Metal Co.*,[60] the Supreme Court held that recognition by the United States of a foreign government as the de jure government of a foreign state is to be made retroactive in effect, validating all acts of that government after coming into existence. These cases have little to do with

55. This formulation takes into account the same point made in the November 16, 1983 letter from the Section of Antitrust Law of the American Bar Association to Louis Henkin (on file with the author).

56. Letter from Judge Malcolm Wilkey to Louis Henkin, at 4 (Aug. 24, 1984) (on file with the author). The position was elaborated in April & Fried, *Compelling Discovery and Disclosure in Transnational Litigation: A Canadian View*, 16 N.Y.U. J. INT'L L. & POL. 961 (1984).

57. Clayco Petroleum v. Occidental Petroleum, 712 F.2d 404, 406 (9th Cir. 1983).

58. 425 U.S. 682 (1976).

59. 246 U.S. 297 (1918).

60. 246 U.S. 304 (1918).

looking behind the formal representations a government makes to a United States court about its state actions. None of these cases provides guidance as to whether foreign governments may establish act of state defenses by formal written submissions to a court, thereby rendering unreviewable acts as to which the submissions assert explicitly articulated governmental policy.

By contrast, a pending case before the Supreme Court, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[61] clearly poses this issue. In *Matsushita Electric*, the United States Solicitor General filed a brief in January 1985 this month in support of the petition for certiorari sought by defendants in the 14-year-old Japanese color television antitrust case. That brief contended that an explicit and detailed statement by the Japanese government made to the United States court, asserting that it mandated conduct by the defendants at issue in the litigation, "should have been given dispositive weight."[62] The Solicitor General is probably correct that if United States courts look behind the formal and explicit representations of foreign governments to determine whether or not they are telling the truth (i.e., whether those governments' role was indeed as they now characterize it), they will necessarily be impinging upon the diplomatic process and challenging the validity of and motivation behind foreign sovereign acts. If important United States interests are injured by giving conclusive weight to foreign sovereign statements in any particular case, the United States has an arsenal of diplomatic measures it can take to seek to protect United States interests.

Second, many courts and non-experts will need more help than the current draft of the Revised Restatement provides in understanding the differences between the act of state and foreign government compulsion doctrines. This might usefully be made the subject of a separate Section 428 Reporters' Note. In such a note, it would be worth emphasizing that private citizens, not governments, usually invoke the act of state defense, claiming that the alleged injury was caused by political acts of the government or authorized acts of its agents. On the analysis presented above, the defense applies even if the defendants were not compelled to comply with the identified governmental policies. Thus, in the pending *Matsushita Electric* certiorari petition, even if the Japanese government only authorized the export pricing agreement among Japanese television firms as a matter of established policy, but did not compel it, that should be sufficient to maintain the act of state defense as to their conduct in Japan.[63]

61. 723 F.2d 319 (3d Cir. 1983), *cert. granted in part*, 53 U.S.L.W. 3702 (U.S. Apr. 2, 1985) (No. 83-2004).

62. Brief for the United States as Amicus Curiae at 6, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 723 F.2d 319 (3d Cir. 1983), *cert. granted in part*, 53 U.S.L.W. 3702 (U.S. Apr. 2, 1985) (No. 83-2004).

63. Of course, such authorization would not legitimate price fixing conduct *within the United*

The participation of the Solicitor General in this appeal to further the application of international law in United States adjudications is appropriate. It has not been done with sufficient frequency in other cases. At the very least, the Executive Branch should notify United States courts in all cases where sovereign law or policy conflicts appear to exist that important foreign governmental and United States foreign relations interests are involved. I agree with Judge Wilkey when he observes that the Restatement

> could perform a real service by emphasizing that each branch of the government—legislative, executive, and judicial—has an obligation to avoid or resolve conflicting jurisdiction by applying its own unique powers. Congress should consider specifically limiting U.S. jurisdiction in areas where it may conflict with foreign interests; the Executive must be prepared to negotiate political accommodations and employ diplomatic channels; and, the courts should be ready to apply conflicts and comity principles to solve problems which could not be anticipated or dealt with by the other two branches.[64]

I would only add that the courts can perform their role best not by applying conflicts and comity principles in adjudicating such conflicts, but by properly applying the act of state doctrine, and doing so early in the litigation pursuant to motions to dismiss. The purposes behind the act of state defense are not realized if the defense is only found after full discovery and adjudication.

The rationale underlying the act of state doctrine as it applies to sovereign legal conflicts can be expressed as a principle that no state should have its sovereignty within its territory infringed or nullified by the laws of a foreign state applied extraterritorially. This principle applies not only to the act of state doctrine but also to limitations on the foreign sovereign compulsion doctrine as to foreign discovery (discussed in Section 420 of the Revised Restatement) and jurisdiction to control foreign subsidiaries of United States corporations (as discussed in Section 418). To the extent that the present drafts of those two Sections permit a United States court or law enforcement agency to require of foreign corporations or individuals residing in a foreign jurisdiction, especially foreign nationals, a higher duty to obey United States law than to obey their home or host sovereigns as to conduct in their home or host territory, they certainly violate international law, and set a standard that the United States would not tolerate if turned against its residents.

IV. Conclusion

The rule of reasonableness contained in Section 403 is inconsistent with international law to the extent it permits United States courts and law

States by such firms since the act of state (wherever undertaken) must relate to the public policy of the sovereign as to persons or conduct within its territory.

64. Letter from Judge Malcolm Wilkey to Louis Henkin, at 4 (Aug. 24, 1984) (discussing Section 403) (on file with author).

enforcement agencies to resolve, unilaterally, public policy conflicts between the United States and a foreign sovereign state whose ability to govern within its territory may be undermined if United States jurisdictional claims are made paramount. However, the rule of reasonableness is established as United States law even if in violation of international law, and United States interests may not be enforced in the face of sovereign jurisdictional conflicts as a matter of United States law, at least without a balancing test. If, under the rule of reasonableness in Section 403, the paramountcy of foreign sovereign interests in governing those within their territory is recognized as not subject to being balanced away, and if the act of state doctrine in Section 428 is properly described, it becomes largely unnecessary for United States courts to balance competing state interests. That approach in turn would minimize the conflict between the rule of reasonableness and international law.